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IN THE

Supreme Court of the United States

October Term, 1956

No. 260

JOSEPH CURCIO, *Petitioner*

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF PETITIONER RESPECTING POSSIBLE MOOTNESS

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Petitioner, Joseph Curcio, respectfully submits this memorandum in response to the memorandum of the Solicitor General submitted heretofore to the Court, calling attention to new facts which purportedly raise a possible question of mootness in this case. Although in his memorandum the Solicitor General asserts that it is the Government's opinion "that these new facts do not render the case moot", nevertheless, there is fashioned in this memorandum an argument tending to support a judgment that this case is now in fact moot. Petitioner has been sentenced to imprisonment and is therefore constrained to vigorously disagree with this argument.

If the Solicitor General's memorandum be deemed a "motion" on behalf of the Government to dismiss the writ of certiorari granted in this case on the ground of mootness, then it is respectfully submitted that this motion should in all respects be denied.

As to the statement of new facts set forth in the Government's memorandum, petitioner desires to relate some facts omitted from the Government's statement and to explain the circumstances under which these new facts developed.

Subsequent to the grant of the writ of certiorari in this case (October 8, 1956), the United States Attorney's office learned from the bookkeeper and the accountant for the union of the existence and location of certain books and records of the union. These particular books and records in the main have starting entries of August 1956. Consequently, in the main, it must be stated frankly that they could not have been the records called for by the subpoenas served on petitioner on April 10, 1956. Upon learning of the existence and location of these other books and records, the United States Attorney caused a new subpoena to be served on petitioner on or about November 8, 1956 calling for their production.

In response to this new subpoena, petitioner appeared before the Grand Jury and sought to avoid compliance with the new subpoena on the ground that the production of the records at this time would conflict with the pendency of petitioner's case before this Court. Thereafter, an order to show cause was issued by the District Court, requiring petitioner to show cause why he should not be held in contempt a second time. On the return of the order to show cause on November 14, 1956, petitioner appeared with

counsel before the Court, explaining that to comply with the new subpoena might in effect prejudice petitioner's case before this Court, unless some disposition were made of the previous contempt order. Inquiry was made at the hearing before Judge Cashin as to what effect the production of the books and records would have on the previous contempt, which is the subject matter of the appeal to this Court. The Assistant United States Attorney stated unequivocally that as far as the Government was concerned, it would have no effect and that the Government wanted Curcio to go to jail for his first refusal to answer questions as to the whereabouts of books and records in April 1956. The Court thereupon ordered petitioner to produce the books and records called for by the second subpoena and, over counsel's objection, the records were produced.[1]

Notwithstanding the statement set forth at page 3 of the Government's present memorandum, to the effect that defense counsel finally agreed that petitioner would produce the books and records for the Grand Jury, at no time did defense counsel so agree, and the production of the books and records called for by the second subpoena was done over counsel's objection and under threat of a new contempt proceeding and another jail sentence.

In the instant cause which is awaiting argument before this Court, the petitioner has been adjudged guilty of a criminal contempt, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, and has been sentenced to imprisonment for six months. The criminal nature of the

[1] Compliance with a judgment under duress or by the exercise of coercive power does not render a case moot. *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437; *Cahill* v. *New York, New Haven & Hartford Railroad Co.*, 351 U. S. 183.

petitioner's act was the dominant feature of the proceeding and the proceeding was instituted at the instance of the United States. That sentence still stands and, so far as the petitioner is concerned, he has been found guilty of an infamous offense involving in its punishment the loss of his liberty. Certainly, therefore, as to him, this case is far from moot. It is true that by the very nature of the order punishing him for contempt, he is "carrying the keys of the prison in his own pocket". *In re Nevitt*, 117 F. 448, 461. Petitioner still believes that answering the questions, which were the subject matter of the contempt proceeding, would in fact result in his incriminating himself of a possible charge of conspiracy to obstruct justice or other offenses under the United States laws which the Government may seek to commence against him. At this stage of the cause, he should not be coerced into that perilous position.

The petitioner claims his conviction was obtained by a procedure which fails to comport with due process of law, in that the decision of the Court below was directly in conflict with the applicable decisions of this Court (Petition for Writ of Certiorari, Oct. Term 1956 No. 260 pp. 15-26). It is no solace to him that the Government concedes now at page 4 of its brief that with the books produced in its hands, that if questions were now put to petitioner concerning the whereabouts of the books his claim of privilege with respect thereto would be in a "different posture" than in the original proceeding now before the Court.

The petitioner's "posture" has not changed so long as the judgment of conviction remains in effect.

The suggestion in a footnote to the brief of the Solicitor General that on remand the district court may modify the sentence if it is appropriate to do so (Rule 35, F. R. Crim. P.), is hardly an adequate substitute for a determination on the merits of the constitutional questions involved in this case. The petitioner is reluctant to place himself at the mercy of the district judge before whom he ostensibly was contemptuous.

If in fact, as the Solicitor General admits, the petitioner's claim of privilege with respect to the original questions asked the petitioner is now in a different posture, this same spirit of frankness with which this statement is made requires one further step. In view of the nature and character of the conditions which might have caused, as the Solicitor General states, the case to become moot, the ends of justice exact that the United States should voluntarily consent to vacating the order adjudging the petitioner guilty of a criminal contempt and sentencing him to imprisonment. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 478. This seems to be the established rule in federal practice in civil cases declared moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39. There is no counterpart of this procedure in federal criminal cases.[2]

If the Government believes that this case has now become moot, then it should be willing to have the procedure followed in civil cases applied to this case, with the judgment

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[2] Quaere: May this Court consider these briefs as an application to vacate the judgment of conviction and remand this case to the district court to dismiss the proceeding, as it did in *Trock* v. *United States*, 351 U. S. 976, on the authority of *Hoffman* v. *United States*, 341 U. S. 479.

of the Court of Appeals reversed or vacated and the proceeding remanded to the district court with a direction to dismiss.

Respectfully submitted,

SAMUEL MEZANSKY,
Attorney for Petitioner.

DANIEL H. GREENBERG,
on the Brief.

December, 1956